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“Let’s Play”: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use

CONRAD POSTEL*

Some of the most watched user-created videos on the Internet are recordings of individuals playing video games. These are commonly referred to as “Let’s Play” videos. The revenue that these videos can generate on YouTube and Twitch TV has created a multi-billion dollar industry. Unfortunately, this burgeoning industry utilizes copyright protected works. Some video game companies assert that “Let’s Play” videos infringe upon their copyright protection. The “Let’s Play” community claims that their videos fall within the fair use defense to copyright infringement claims.

This Note analyzes how a court would apply the fair use defense to “Let’s Play” videos. My analysis finds that precedential case law is unfavorable to “Let’s Play” videos, and that a court would most likely find that none of the four factors involved in the fair use defense analysis support protecting “Let’s Play” videos. This Note goes on to suggest that a compulsory license would be the best solution to balance the interests between the “Let’s Play” community and video game companies in this context.

* J.D. Candidate, University of California Hastings College of the Law, 2017. I would like to thank the *Hastings Law Journal* staff and editors for their hard work and suggestions. I would also like to thank my fiancée and my parents for their support throughout my time in law school.

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INTRODUCTION

“Let’s Play” is a term originating in the gaming community to refer to a video of someone playing a video game.¹ The user-generated video often includes the player’s commentary as well. What was once a niche expression in the gaming community is now used by a large industry.² The largest user of bandwidth is Netflix, followed by Google, Apple, and Twitch TV, a website that streams “Let’s Play” videos.³ Through YouTube and Twitch TV, “Let’s Play” makers are able to earn ad revenue, and “Let’s Play” videos generate about \$3.8 billion a year.⁴ Video game players have the potential to make vast amounts of money. For example, the top paid “Let’s Play” star Felix Kjellberg, known as PewDiePie, made twelve million dollars in 2015, and his YouTube channel was the first of any genre to reach ten billion views.⁵ The video game industry has not yet formally challenged the copyright infringement of “Let’s Play” videos, but Nintendo

1. Ivan O. Taylor, Jr., *Video Games, Fair Use and the Internet: The Plight of the Let’s Play*, 2015 U. ILL. J.L. TECH. & POL’Y 247, 248.

2. See Chris Kohler, *Why Does Nintendo Want This Superfan’s YouTube Money?*, WIRED (Mar. 27, 2015, 6:30 AM), http://www.wired.com/2015/03/nintendo-youtube-creators/?mbid=social_twitter; Felix Gillette & Spencer Soper, *How Twitch Turned Video Game Voyeurism into Big Business*, BLOOMBERG (Nov. 19, 2015), <https://www.bloomberg.com/features/2015-the-big-business-of-twitch/>.

3. Gillette & Soper, *supra* note 2.

4. *Id.*

5. Laura A. Parker, *The Cult of PewDiePie: How a Swedish Gamer Became YouTube’s Biggest Star*, ROLLING STONE (Dec. 16, 2015), <http://www.rollingstone.com/culture/news/the-cult-of-pewdiepie-how-a-swedish-gamer-became-youtubes-biggest-star-20151216>.

has continued to take steps to constrain “Let’s Play,”⁶ making litigation foreseeable.

This Note analyzes how a court would approach and adjudicate a case concerning “Let’s Play” videos if a lawsuit did occur. It is undisputed that “Let’s Play” videos infringe upon video game maker’s copyright protected material. The issue here is whether “Let’s Play” videos fall under the defense of fair use. Fair use allows the unlicensed use of some copyright materials “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁷

First, this Note argues that most “Let’s Play” videos fail the traditional understanding of the fair use test. Second, it will show why these videos are important to protect and that there needs to be a solution to prevent losing the commentary from within these videos despite the fact that they do not comply with the traditional fair use test. Finally, this Note will propose that a compulsory license is the best solution to protect “Let’s Play” videos.

I. INDUSTRY BACKGROUND

YouTube and Twitch TV are the main websites that viewers use to watch “Let’s Play” videos.⁸ After Amazon bought Twitch TV for \$970 million in 2014, these two competitors became part of a larger Internet arms race between their respective parent companies, Google and Amazon.⁹ In addition to advertising revenue, Twitch allows viewers to pay subscription fees of about five dollars per month to their favorite channels in return for subscriber only chats and custom emojis.¹⁰ Twitch viewers are ninety-five percent male, with the average viewer spending 106 minutes per day watching the videos.¹¹

A number of circumstances have prevented litigation in this area so far. First, the majority of “Let’s Play” makers cannot afford the legal fees to challenge when their videos are taken down.¹² Second, the high-earning “Let’s Play” makers are often featured in company channels, like Machinima, which take a percentage of advertising revenue and handle legal issues and licensing.¹³ Third, most streaming “Let’s Play” feeds feature games that allow user uploading by the terms of service.¹⁴ Fourth,

6. Kohler, *supra* note 2.

7. Copyright Act, 17 U.S.C. § 107 (2012).

8. Gillette & Soper, *supra* note 2.

9. *Id.*

10. *Id.*

11. *Id.*

12. Kohler, *supra* note 2.

13. *Id.*

14. BRYCE BLUM & MICHAEL J. SCHWARTZ, *STREAMING AND COPYRIGHT LAW: A FAST-DEVELOPING AREA OF THE LAW* 2 (2014). Twitch’s streaming “Let’s Play” videos are mostly large, competitive,

the video game industry is hesitant to stomp out “Let’s Play” videos because they act as free advertisements.¹⁵ Finally, the game industry fears backlash from the gaming community.¹⁶

The current state of “Let’s Play” benefits all parties involved: Video creators are able to share their experiences and make advertising revenue, YouTube and Twitch also profit from advertising revenue, and video companies can license their games and receive free publicity.¹⁷ However, Nintendo has tried to assert its property rights over “Let’s Play” videos, which threatens the delicate status quo.

In May 2013, Nintendo registered its intellectual property with YouTube’s Content ID, which ensured that all advertising revenue was redirected from “Let’s Play” uploaders to Nintendo.¹⁸ Amid community backlash, Nintendo dropped this action in June 2013.¹⁹ In 2015, Nintendo announced the Nintendo Creators Program in which Nintendo would take forty percent of the revenue produced by a “Let’s Play” video, and thirty percent of the channel’s revenue.²⁰ This has led to concerns in the “Let’s Play” community that Nintendo will force positive commentary in “Let’s Play” videos, as Nintendo has the right to approve of all videos before they can be uploaded.²¹ The combination of Nintendo taking a sizeable portion of revenue and having the ability to prevent negative commentary has caused aggravation in the community, with the Nintendo Creators Program being compared to “a reviewer signing terms of employment” with the company they are reviewing.²²

Before going into the fair use analysis, it is important to try to distinguish different types of “Let’s Play” videos because the level of commentary in these videos is key in the fair use analysis. While there are several types of videos, this Note focuses on three basic categories: (1) reviews; (2) playthroughs with commentary; and (3) playthroughs without commentary. To explain what these each are, this Note will use three examples featuring gameplay from the game *Alien: Isolation*, a

multiplayer games like *League of Legends*, *DOTA 2*, and *Hearthstone*. These games expressly allow streaming in the terms of use. *Id.*

15. Gillette & Soper, *supra* note 2. In fact, Nintendo, Sony, Activision, Microsoft, and Blizzard have their own Twitch channels to show off their latest games. Often when a new game is released, Twitch “Let’s Play” makers stream playing it extensively to see if it is worth buying. *Id.*

16. Taylor, Jr., *supra* note 1, at 248–49.

17. *Id.* at 249.

18. *Id.* at 248. YouTube’s Content ID compares uploaded videos to audio and video files registered by content owners. *Buyers Guide to YouTube Content ID & Copyright Notices*, ENVATO MARKET, <https://help.market.envato.com/hc/en-us/articles/204484680-Buyers-Guide-to-YouTube-Content-ID-Copyright-Notices> (last visited June 4, 2017).

19. Taylor, Jr., *supra* note 1, at 248–49.

20. Kohler, *supra* note 2.

21. *Id.*

22. *Id.*

survival horror game taking place in the universe of the Alien film franchise.²³

The first category of “Let’s Play” videos constitutes reviews of games. In GT Reviews’ “*Alien: Isolation - Review*,” the eight minute video shows gameplay, but the audio during the gameplay is almost exclusively from a commentator.²⁴ The commentator spends the entire video giving his critical opinion of the game.²⁵ The commentator talks about the over-effectiveness of one weapon, while the video shows that weapon being used.²⁶ The gameplay scenes are not from continuous parts of the game, but rather feature a montage of clips from points throughout the game. The gameplay in the video is used to illustrate and give context to the viewer while they listen to a critical opinion. As this Note will discuss later, this type of game footage usage is protected under fair use.

The second category of “Let’s Play” videos are playthroughs with commentary. An example of this type of video is the top earning “Let’s Play” uploader, PewDiePie’s “FIRST ALIEN ENCOUNTER! – Alien Isolation - Gameplay Walkthrough - Part 5.”²⁷ This video is part five of thirteen in a video series that shows the entire game played.²⁸ The uploader speaks throughout the twenty-eight minute video. In addition, the player’s face can be seen in a small box in the corner of the screen.²⁹ The commentary is a stream of consciousness by the player who talks about anything that enters his mind while playing the game. For example, the player mocks the accent of one character, freestyle raps, and frequently discusses what strategies he could use while playing the game.³⁰ Unlike a review video, the audio features both the commentator and the sounds of the game.³¹ In fact, the player pauses his commentary when the game has important dialogue.³² Also unlike a review, the player’s commentary is rarely about the merit of the game, but rather, the player’s experience playing the game. A viewer could watch all thirteen episodes and see the entire game played. As this Note will demonstrate, it is unlikely that playthroughs with commentary would fall within the protections of fair use.

23. Andy Kelly, *Alien: Isolation Review*, PCGAMER (Oct. 3, 2014), <http://www.pcgamer.com/alien-isolation-review/>.

24. GT Reviews, *Alien Isolation - Review*, YOUTUBE (Oct. 7, 2014), <https://www.youtube.com/watch?v=FPqo4TW1bPU>.

25. *Id.*

26. *Id.*

27. PewDiePie, *First Alien Encounter! – Alien Isolation – Gameplay Walkthrough – Part 5*, YOUTUBE (Oct. 8, 2014), <https://www.youtube.com/watch?v=u5v6PN2KV9U&list=PLYH8WvNV1YEn35BZl0pe5ualYoAhCfw8W&index=5>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

The final category of “Let’s Play” videos are playthroughs with no commentary. RabidRetrospectGames’s “Alien Isolation Full Game Walkthrough / Complete Walkthrough HD No Commentary” is an example of a playthrough with no commentary.³³ This ten hour, thirty-nine minute video shows the gameplay of the entire game;³⁴ there is no commentary, and it is as if the viewer is playing the game, except the viewer is not causing the action on the screen.³⁵ As this Note will show, playthroughs with no commentary are afforded no protection under fair use.

II. FAIR USE ANALYSIS

“Let’s Play” is a clear case of copyright infringement through a derivative work. A derivative work presents an original work in a new form.³⁶ A simple example of a derivative work that violates the original copyright is a book that gives an in-depth retelling of a television show’s episodes.³⁷ Therefore, “Let’s Play” clearly constitutes an infringing derivative work. The videos show the same original work, but in the different format—a video instead of an interactive game. To avoid a copyright violation, “Let’s Play” videos need to establish a defense using the fair use test.

The fair use test comes from 17 U.S.C. § 107, the Copyright Act. This statute provides four factors in the test for fair use:³⁸

- (1) “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”;³⁹
- (2) “the nature of the copyrighted work”;⁴⁰
- (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”;⁴¹ and
- (4) “the effect of the use upon the potential market for or value of the copyrighted work.”⁴²

33. RabidRetrospectGames, *Alien Isolation Full Game Walkthrough / Complete Walkthrough HD No Commentary*, YOUTUBE (Oct. 7, 2014), https://www.youtube.com/watch?v=Vdzz_cPTsqo.

34. *Id.*

35. *Id.*

36. Copyright Act, 17 U.S.C. § 101 (2012).

37. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993).

38. Copyright Act, 17 U.S.C. § 107.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

A. FACTOR ONE: PURPOSE AND CHARACTER OF THE USE

This first factor assesses the purpose and character of the use, and is analyzed by looking at two considerations: “(1) whether the use is transformative, and (2) if it is commercial.”⁴³ The U.S. Supreme Court interprets “transformative” as adding something new to the original with a further or different purpose, thus altering the message of the original.⁴⁴ While profit does factor into the analysis, infringement of a for-profit work is not conclusive evidence that the work in question fails at the first factor.⁴⁵

Factor one is favorable toward reviews using gameplay footage. Courts often grant fair use protection for the purpose of criticism.⁴⁶ Taylor Bartholomew, in *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, states that consumers watch video game reviews for the same reasons that consumers would read movie reviews, and it should not be treated differently.⁴⁷ In fact, YouTube uses a review of the video game *Drake and the 99 Dragons* by ProJared as an example of a video that uses gameplay and is protected by fair use.⁴⁸ This video features gameplay, but it is used to illustrate the critical observations of the commenter.⁴⁹ The commentary is about the merit of the game, and the commentary audio is much louder than the gameplay audio. The video features scenes of gameplay and does not show gameplay in a linear retelling. The purpose of using protected materials in reviews is to show consumers what the game looks like and to provide proper context for their criticisms. Reviews using gameplay help consumers decide what games are worth buying, similar to reviews for other forms of media.⁵⁰

This Note takes the position that factor one is less favorable to playthroughs with commentary—but it is important to acknowledge the alternative view existing that factor one favors playthroughs with commentary. The “Let’s Play” community argues that factor one is favorable to playthroughs with commentary because the videos are transformative by virtue of the new content—that is, the commentary.⁵¹ In addition, while the commentary in this type of “Let’s Play” may differ

43. Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 74 (2015).

44. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *see Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

45. Bartholomew, *supra* note 43, at 79; *Campbell*, 510 U.S. at 584.

46. Bartholomew, *supra* note 43, at 75; *Bill Graham Archives*, 448 F.3d at 609.

47. Bartholomew, *supra* note 43, at 77.

48. Kohler, *supra* note 2; *see also* ProJared, *Drake of the 99 Dragons – ProJared*, YOUTUBE (Dec. 11, 2011), <https://www.youtube.com/watch?v=tHOaqmrEKI>.

49. ProJared, *supra* note 48.

50. Bartholomew, *supra* note 43, at 77.

51. Taylor, Jr., *supra* note 1, at 255.

from reviews, the commentary still has a purpose different from that of the original work's story.⁵² For example, speed runs are a type of gameplay video in which the uploader tries to complete the game as fast as possible.⁵³ The commentary in these videos is often explaining their strategies.⁵⁴ The uploader's purpose is partly to educate other players, which is different from the purpose of the original work.⁵⁵

In *Cariou v. Prince*, the Second Circuit Court of Appeals stated:

The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.⁵⁶

Cariou involved an artist who would take other visual works and physically alter and combine those works with additional works.⁵⁷ The court upheld this defendant's use of protected materials on the basis that the goal of copyright law is to "promote the Progress of Science and useful Arts."⁵⁸ The court held that fair use allows for an original work to be used as a raw material when it is transformed for the creation of new information.⁵⁹

Cariou offers an analogy supporting the argument for "Let's Play" videos with commentary to receive protection under factor one. Some gameplays will have a valued purpose, such as the educational value in speed run videos. Even videos that do not have an educational purpose have some favorable support under *Cariou*, as fair use covers purposes outside of those originally conceived. In addition, many viewers enjoy the commentary and spend a considerable amount of time watching their favorite uploaders as opposed to watching any uploader. Allowing videos of this sort to be deemed a copyright violation would run contrary to the previously mentioned purpose of copyright law: the promotion of art.

There is an even stronger argument, however, for factor one disapproving playthroughs with commentary. Works are not transformative if they merely present the same material in a different form.⁶⁰ Unlike the altered photos in *Cariou*, playthroughs have not distorted the original, nor taken it out of its original context. In fact, in PewDiePie's *Alien Isolation* playthrough, the commentator remains silent during the game's dialogue.⁶¹

52. *Id.* at 260.

53. See SPEEDRUN.COM, <http://www.speedrun.com/> (last visited June 4, 2017).

54. Taylor, Jr., *supra* note 1, at 265.

55. *Id.*

56. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

57. *Id.* at 699.

58. *Id.* at 705 (quoting U.S. CONST. art. I, § 8, cl. 8).

59. *Id.*

60. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir.1993).

61. See PewDiePie, *supra* note 27.

While courts recognize that it is tolerable to have a commercial purpose when the work is highly transformative, commercial purpose still goes against fair use protection.⁶² Even if commentary is said to be transformative, it would be difficult to argue that it constitutes a high degree of transformation as the original is undisturbed. Turning a microphone on and recording yourself playing a game would be a low threshold to satisfy the transformation standard.⁶³ Adding an audio track to a video game and not changing anything else is a far smaller amount of transformation than completely distorting an image to make a new image, as in *Cariou*.

Playthroughs with commentary are more closely related to the standard established in *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, where the Second Circuit declined to extend fair use protection to a book full of trivia questions about the television show *Seinfeld* because the book “repackag[ed] *Seinfeld* to entertain *Seinfeld* viewers.”⁶⁴ Unlike the trivia book,⁶⁵ playthroughs may in fact expose new potential customers to the original work and provide their own commentary. However, the court in *Castle Rock* held that the trivia book retelling events of the show “so minimally alters” the original that it is evidence that there is no transformation.⁶⁶ The court also stated that the incorrect answers in the trivia book were original, but the correct answers had no alteration.⁶⁷

Another comparable case is *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, in which the Second Circuit held that books summarizing the plots of television episodes did not fall within the protections of fair use.⁶⁸ The court held that giving brief summaries of plots before going into commentary is acceptable under a fair use analysis, but going beyond that is not protected.⁶⁹ A pure retelling is an exclusive right retained by the copyright holder.⁷⁰

Playthroughs with commentary are minimally altered like the books in *Castle Rock* and *Twin Peaks*. The original work is not even in a completely new form as the copyrighted images of the video games are fully shown, unlike the transformation from film to text in *Castle Rock* and *Twin Peaks*. The only alteration of the original is the addition of the audio from the commenter and occasionally a small box showing the

62. *Cariou*, 714 F.3d at 708; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

63. Stephen Carlisle, *The Strange World of “Let’s Play” Videos and the Copyright Problems They Create*, NOVA SOUTHEASTERN U. (Apr. 2, 2015), <http://copyright.nova.edu/lets-play-videos/#note-879-11>.

64. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

65. *Id.* at 142–43.

66. *Id.* at 143.

67. *Id.*

68. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1370 (2d Cir. 1993).

69. *Id.* at 1375.

70. *Id.* at 1376.

commenter's face. Similar to *Castle Rock*, the layered-on audio is original to the uploader, but the playthrough is taken from the original copyright holder with no alteration.⁷¹ Unlike a review, which will use gameplay to illustrate commentary, playthroughs with commentary retell the entire story of a game. However, commentators could strengthen their fair use case by focusing more on criticism rather than just retelling.

A counterargument against factor one approving of playthroughs with commentary is that part of the purpose of the video is to allow those that do not have the time to play a video game to experience it.⁷² The transformation needs a new message in order to be protected, and while there is transformation in converting a video game to a video, the intention of the video maker to create a market substitute is not a protected new message.⁷³ The problem of market substitution will be covered later on in Part II.D. in the analysis regarding factor four.

A strong argument in favor of factor one approval of playthroughs with commentary is that they have the purpose of showing strategy, and do not interfere with the original work, as these games are replayable.⁷⁴ Videos that feature multiplayer content, in which multiple human players play with and against each other, often educate viewers that have already purchased the game on strategy.⁷⁵ With the rise of e-sports, larger licensing agreements have been made with these types of games.⁷⁶ These videos create a new message in the form of demonstrating game strategy, and because of the inherent replay value of the video games the purpose of the videos does not seem to be to retell the story.⁷⁷ Thus playthroughs with a linear story, like the example of *Alien Isolation*, will not have support from factor one as there are fewer strategies demonstrated and the purpose of the videos seem to primarily be a retelling of a cinematic experience.⁷⁸ The distinction of multiplayer games gives strong support for "Let's Play" videos receiving factor one protection, but these videos still would not likely receive fair use protection because they still would not meet the requirements of the third and fourth factors of the fair use test.

In conclusion, it is not clear whether playthroughs with commentary would be approved of under factor one of the fair use test. An original work can be used as raw material to create a new message (that does not

71. See PewDiePie, *supra* note 27.

72. Taylor, Jr., *supra* note 1, at 252.

73. *Id.* at 255.

74. See James Puddington, Note, *Fair Play: Economic Justifications for Applying Fair Use to the Online Streaming of Video Games*, 21 B.U. J. SCI. & TECH. L. 413, 425 (2015) (breaking down the fair use arguments for different categories of "Let's Play" videos).

75. *Id.* at 426–27.

76. *Id.*

77. *Id.* at 426–29.

78. *Id.* at 430–31.

necessarily have to be criticism). However, playthroughs with commentary do not substantially transform the original, like the art in *Cariou*. Thus, a court would most likely find that factor one disfavors playthroughs with commentary.

It is clear, however, that factor one disapproves of playthroughs *without* commentary.⁷⁹ Twitch’s former Rules of Conduct state that “[p]erformances are permitted only to the extent that they contribute to the creation of an original work. However, broadcasts that focus entirely on performances of preexisting material are not permitted.”⁸⁰ Those that argue that factor one approves of playthroughs with commentary acknowledge that commentary is what can transform the game, and without it there is no fair use.⁸¹ In the *Alien Isolation* video with no commentary, there is no transformation other than converting the work to a different format.⁸² The purpose seems to be purely to act as a substitute for the game.

B. FACTOR TWO: NATURE OF THE COPYRIGHTED WORK

This factor is very straightforward: Certain works are given more copyright protection than others are. For example, fictional works are more heavily scrutinized under the fair use test than factual, nonfictional works.⁸³ Video games are a fictional work,⁸⁴ therefore “Let’s Play” videos are subject to higher scrutiny under the fair use analysis. Failing this factor does not necessarily alone determine if the work fails the fair use test.⁸⁵ For example, reviews are not severely impacted by failing the second factor alone, because the first factor is so strong in their favor. But failing at any factor still somewhat weakens the argument that playthroughs with and without commentary should receive protection.

C. FACTOR THREE: AMOUNT AND SUBSTANTIALITY TAKEN

The third factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁸⁶ With respect to playthroughs with and without commentary, there are strong arguments for protection in factors one and four, but factor three strongly disapproves of both. However, factor three favors reviews.

79. See Larry Iaccio, *Fair Use, YouTube: Copyright Infringement & Why Twitch TV and YouTube Gaming Are Above the Law*, GAME SKINNY, <http://www.gameskinny.com/twt5/copyright-infringement-why-twitch-tv-and-youtube-gaming-are-above-the-law> (last visited June 4, 2017).

80. *Rules of Conduct*, TWITCH (last updated Nov. 20, 2015), <https://web.archive.org/web/20160404171604/https://www.twitch.tv/p/rules-of-conduct>.

81. Puddington, *supra* note 74, at 429.

82. RabidRetrospectGames, *supra* note 33.

83. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143–44 (2d Cir. 1998).

84. Carlisle, *supra* note 63.

85. *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013).

86. Copyright Act, 17 U.S.C. § 107 (2012).

There is a limit to the amount of the original work that can be taken, particularly when the part of the original copied is especially significant, like the climax of a story.⁸⁷ However, the acceptable amount of what is copied is directly related to the purpose of copying.⁸⁸ Certain purposes call for the use of a greater portion of the original material than other purposes. For example, even though reviews use footage of gameplay, the copying is reasonable in relation to the purpose of giving criticism while providing context. *New Era Publications v. Carol Publishing Group* provides an example of the third factor protecting copying done in order to provide proper context. In that case, a biography on L. Ron Hubbard used eight percent of eleven different copyrighted works by Hubbard.⁸⁹ The court permitted this amount in the given context.⁹⁰

The game reviews videos use much less than eight percent of the gameplay. For example, one reviewer spent over sixty hours playing *Skyrim* to make a nineteen-minute video.⁹¹ More specifically, screenshots from video games have been deemed to not constitute a substantial amount copied.⁹² It is likely that a court would treat brief scenes of gameplay in a review the same way it would treat screenshots, because the review's use of gameplay footage is necessary to give proper context to the legitimate purpose of providing criticism about the game.

Harper & Row, Publishers, Inc. v. Nation Enterprises indicates that playthroughs would not be protected by the third factor. The magazine *The Nation* only used 300 words from a 200,000 word manuscript written by Gerald Ford.⁹³ But because those 300 words were about the key events of the Watergate scandal, the Supreme Court found that *The Nation* "appropriated the heart" of the manuscript, as this was the portion of the manuscript that the public was curious about.⁹⁴ A playthrough arguably goes much further by appropriating the entire work, including any plot twists and climaxes, which are "the heart" of a video game's narrative.⁹⁵ In *Twin Peaks*, the summaries of episodes were also deemed to constitute a "substantial portion" of the original work.⁹⁶

87. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

88. *Id.*; Bartholomew, *supra* note 43, at 80.

89. Bartholomew, *supra* note 43, at 76; *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 158 (2d Cir. 1990).

90. Bartholomew, *supra* note 43, at 76; *New Era Publ'ns Int'l, ApS*, 904 F.2d at 158.

91. Bartholomew, *supra* note 43, at 81.

92. Taylor, Jr., *supra* note 1, at 259; *Sony Comput. Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. 2000).

93. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 579 (1985) (Brennan, J., dissenting).

94. *Id.* at 600.

95. See Carlisle, *supra* note 63.

96. See *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir.1993).

Cariou, on the other hand, states that entire works can be copied if the only way secondary art can be made is to copy the original entirely.⁹⁷ The court in *Cariou*, however, held that the third factor weighed in the secondary work’s favor because the defendant transformed most of the “photographs into something new and different.”⁹⁸ The court went on to discuss the change in tone of some of the photographs.⁹⁹ The transformation in *Cariou* was so substantial that the defendant did not copy a substantial portion because the original work was unable to be perceived.¹⁰⁰ However, *Cariou* did not give fair use protection to five of the defendant’s photographs because they did not distort the original work enough to make it unrecognizable.¹⁰¹ In particular, the court held that those photos were not protected because the background of the original was unchanged.¹⁰² Thus, it would be difficult to convince a court that playthroughs with commentary would receive support even under the favorable ruling in *Cariou* because the video game’s original images serve as the background to the “Let’s Play” videos. That background is not distorted at all. While commentary is a form of transformation, it does not completely replace the original. Unlike the protected photos in *Cariou*, “Let’s Play” playthroughs do not obscure any of the visual elements.

It would be even more difficult to convince a court that has not adopted the Second Circuit’s reasoning in *Cariou* that the third factor is in favor of videos with commentary. In *Kienitz v. Sconnie Nation LLC*, the Seventh Circuit disapproved of *Cariou* because the ruling gives too much significance to transformation.¹⁰³ The Seventh Circuit stated that under *Cariou*, any derivative work would fall under fair use because any derivative work is transformed into a new form.¹⁰⁴ Even with *Cariou*’s generous treatment of copying a whole work, playthroughs would still fail the third factor.

The “Let’s Play” community argues that fair use would cover playthroughs because even though the entire footage of a game is copied, a video game is interactive and thus, only part of the game is being copied.¹⁰⁵ It is true that playthroughs only show what the game looks and sounds like and is not a substitute for the interactive experience of playing the game.¹⁰⁶ While there is merit to this argument, which this

97. See *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013).

98. *Id.*

99. *Id.* at 710–12.

100. *Id.* at 710.

101. *Id.* at 711.

102. *Id.*

103. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

104. *Id.*

105. Bartholomew, *supra* note 43, at 81–82.

106. *Id.*

Note will discuss later, copyright law protects the audiovisual (and code) elements of a game.¹⁰⁷ In the landmark case *Williams Electronics, Inc. v. Artic International, Inc.*, video games received copyright protection even though the defendant claimed that the audiovisual elements were not fixed.¹⁰⁸ To receive copyright protection an audiovisual work must be fixed, meaning that the work must be “permanent or stable to permit it to be perceived.”¹⁰⁹ In *Williams Electronics* the court stated that even though player interaction determined what was viewed, many of the audiovisuals would be seen no matter who played, and thus the work was fixed.¹¹⁰ The court in *Williams Electronics* did not find a copyright violation in comparing the story between the original game and the later game, but instead in the two games’ animations.¹¹¹

The holding in *Williams Electronics* not only disapproves of playthroughs with linear story games, but also playthroughs of multiplayer games because the audiovisual elements remain mostly the same as there are a limited amount of animations that the game creators designed. While playthroughs of multiplayer games may not be appropriating a story, the “heart” of the multiplayer games are the audiovisual elements created by the video game makers. As “Let’s Play” videos show these animations for long durations, “Let’s Play” playthroughs use a substantial portion no matter the type of game.

D. FACTOR FOUR: EFFECT ON THE MARKET

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.”¹¹² The argument that factor four approves of “Let’s Play” is centered on the claim that these videos increase the visibility of the game, which helps their market by acting as free advertisements.¹¹³ *Authors Guild, Inc. v. Google Inc.* supports this argument.¹¹⁴ There, Google Books provided previews of books in which viewers could read portions of reprinted text as they searched for books they wanted.¹¹⁵ The court found that this practice not only did not harm the market, but it favored the market for these books by increasing visibility and improving sales for the authors.¹¹⁶ The video game industry, for the most part, sees “Let’s Play” as beneficial—the biggest companies

107. See *Williams Electronics, Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 877–78 (3rd Cir. 1982).

108. *Id.* at 874.

109. Copyright Act, 17 U.S.C. § 101 (2012).

110. *Williams Electronics, Inc.*, 685 F.2d at 873–74.

111. *Id.* at 875–76.

112. Copyright Act, 17 U.S.C. § 107.

113. Carlisle, *supra* note 63.

114. Bartholomew, *supra* note 43, at 76.

115. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013).

116. *Id.*

have their own Twitch channels.¹¹⁷ Advertisements for video games are also beginning to use “Let’s Play” commentators.¹¹⁸ And an even bolder sign of the beneficial relationship between the industry and “Let’s Play” uploaders is that consoles are streamlining the process for uploading gameplay.¹¹⁹ For example, the PlayStation 4 controller has a share button that enables a user to upload to Twitch in minutes.¹²⁰ Sony and developers like Blizzard grant broad video sharing licenses.¹²¹

All “Let’s Play” videos show viewers what the game actually looks like, which is similar to the way Google Books allows customers to read a portion of a book. Good games will see a boost in sales, while bad games will lose customers who decide they do not want to buy the game. Similar to how parodies can have a negative market effect and still be protected, this potential negative market effect on video games that viewers do not like should not undermine fair use.¹²² In addition, a user’s video game experience is centered on interaction. Therefore watching a game is not a fulfilling substitute for playing it, just as reading a portion of a book through Google Books is not a fulfilling substitute for reading the entire book.¹²³

The counterargument, that there is a negative market effect, contends that the videos are a substitute for the game and decrease sales.¹²⁴ Playthroughs showing entire games take the “heart” of the work and become a free substitute for a game.¹²⁵ Watching a video could discourage a viewer from purchasing the game because they have the plot points spoiled, or simply do not like the game’s plot or gameplay.¹²⁶

With storyline games, it is easy to imagine people watching a video to view the cinematic plot and then deciding there is no need to buy the game. It is harder to imagine this being true for multiplayer games.¹²⁷ In addition, people who decide against buying a game because they did not like the gameplay or visuals strengthens the argument that there is fair use as the “Let’s Play” video is acting as a review instead of as a free substitute.

¹¹⁷ Gillette & Soper, *supra* note 2.

¹¹⁸ See PlayStation, *Far Cry Primal Trailer – YouTuber Reactions | PS4*, YOUTUBE (Feb. 25, 2016), <https://www.youtube.com/watch?v=pJgQDQ39R4> (including commentators’ audio reactions and the commentator in the corner, like many “Let’s Play” videos); EA Star Wars, *Best of Star Wars Battlefront | PlayStation Experience*, YOUTUBE (Dec. 5, 2015), https://www.youtube.com/watch?v=mIdpzv_RngA (showing footage from “Let’s Play” videos without commentary).

¹¹⁹ Taylor, Jr., *supra* note 1, at 261.

¹²⁰ Gillette & Soper, *supra* note 2.

¹²¹ Puddington, *supra* note 74, at 436.

¹²² Taylor, Jr., *supra* note 1, at 256–57.

¹²³ Bartholomew, *supra* note 43, at 81.

¹²⁴ Carlisle, *supra* note 63.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Puddington, *supra* note 74, at 428–29.

Significant market research would be required to discover the true market effect on video game sales, but this is not essential for the purposed of this Note because the derivative works right of video game makers dictates the factor four outcome. That derivative work right provides that copyright holders not only have the right to prevent copying of their work, but also secondary works that are based on the original work.¹²⁸ In the fourth factor analysis, not only must the market effect for the original work be considered, but also the potential market for derivative works.¹²⁹

One purpose of “Let’s Play” is to allow someone to experience the game that would not otherwise have the time to play it.¹³⁰ Courts often assume that the original authors will want the ability to make or license derivative works including film versions.¹³¹ While the original authors cannot restrict reviews, they can restrict secondary works that “report[] the plot in such extraordinary detail as to risk impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to license.”¹³² In *Twin Peaks*, the defendants who produced episode summaries argued that their summaries would help publicity, but the court held that the original authors had a derivative works right in the market of books about its show.¹³³ In addition, in *Castle Rock*, there was no evidence the trivia book was harming the market for *Seinfeld*,¹³⁴ but an original author holds a monopoly right over markets it would generally develop.¹³⁵ Similarly, video game companies have a right to license the derivatives of their original work.

Secondary works that provide criticism do not fall under this monopoly right, but a work that “pays homage” to the original is part of the original author’s derivative work right.¹³⁶ Like a trivia book, most playthroughs with commentary do not have much criticism but instead, the commentary is about what is happening in the game.¹³⁷ In *Cariou*, for example, the court noted that a derivative work market has been usurped when the target audience of the original and the derivative work are the same.¹³⁸ The court in *Cariou* used the example of the trivia book in *Castle Rock*.¹³⁹ Given that many viewers watch “Let’s Play” videos in order to

128. Copyright Act, 17 U.S.C. § 101 (2012).

129. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir.1993).

130. Taylor, Jr., *supra* note 1, at 252.

131. *Twin Peaks Prods., Inc.*, 996 F.2d at 1377.

132. *Id.*

133. *Id.*

134. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

135. *Id.* at 145–46.

136. *Id.* at 145.

137. PewDiePie, *supra* note 27.

138. *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

139. *Id.*

determine whether to buy a game or to learn strategy,¹⁴⁰ it would appear that the target audience is the same as that of the actual video game.

There is clear evidence that videos of playthroughs are a market that video game companies develop or license to develop. Some video game companies have granted broad licenses to players.¹⁴¹ Some companies have not. And Nintendo is trying to gain some of the advertising revenue,¹⁴² as video games generate a significant amount of money from advertisements.¹⁴³ One could imagine a video game company making their own videos of their video games to get advertisement revenue. Thus, as “Let’s Play” videos are an area in which the original has an interest in developing, factor four disapproves of “Let’s Play” playthroughs.

Reviews are permissible under factor four in two ways. First, negative market effects from criticism is permissible under a factor four analysis.¹⁴⁴ Second, a review is not a derivative work because reviews are not products that the original author would want to create or license to be created.¹⁴⁵ Thus, unlike playthroughs with and without commentary, reviews are supported by factor four.

E. CONCLUSION OF FAIR USE TEST

Reviews that use footage from the games to illustrate criticism *would* be protected under fair use. On the other hand, playthroughs with no commentary would *not* be protected under fair use. Courts would most likely find that playthroughs with commentary would not be protected under fair use either. While there is a strong argument that there is some degree of content transformation as required under factor one, a court would more likely than not find that factor one disfavors the video uploaders. Even if the first factor would be in favor of a video maker, the other three factors overwhelmingly disfavor playthroughs with commentary. Of course, each video is unique and a court would have to review each matter on a case-by-case basis to understand the unique details of the video in question, but in general, these are the three major categories of “Let’s Play” videos and how this Note believes a court would treat them.

140. Gillette & Soper, *supra* note 2.

141. Puddington, *supra* note 74, at 436.

142. Kohler, *supra* note 2.

143. Carlisle, *supra* note 63.

144. Taylor, Jr., *supra* note 1, at 256–57; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

145. Taylor, Jr., *supra* note 1, at 267; *Campbell*, 510 U.S. at 590.

III. WHY A TRADITIONAL FAIR USE OUTCOME IS UNJUST

Similar to the *Seinfeld* trivia book in *Castle Rock*, in which one author was creating a book for fans of the show to buy and read,¹⁴⁶ there is no indication that “Let’s Play” videos harm the market for video game sales. In fact, as in *Castle Rock*, it is possible that these unlicensed derivative works are acting as free advertisements. Unlike the *Seinfeld* trivia book, “Let’s Play” involves a large interacting community.¹⁴⁷ People in this community spend large amounts of time watching and discussing these games.¹⁴⁸ Declaring that this growing industry and community is illegal would hinder expression.

In addition, the way a buyer interacts with a video game is very different from how a consumer interacts with a book or movie, and this difference is not reflected in copyright law. Copyright is held by the original author of a work “fixed in any tangible medium of expression.”¹⁴⁹ In *Williams Electronics*, images in video games were held to be fixed because the images were animations created by the author that would always appear even if the user determined the order.¹⁵⁰ While video games do need copyright protection, from the perspective of a user the images are not fixed in terms of the commonsense definition—that commonsense definition meaning “definitely and permanently placed,”¹⁵¹ because the player determines what images are seen. As the user has control over the order in which the audiovisual elements occur, it does not seem that the audiovisual elements are definitely and permanently placed.

Video games may have more in common with patentable objects than copyrighted works. Patents protect inventors from the appropriation of products that have functionality.¹⁵² Video games are played and not observed as movies are (unless someone is watching “Let’s Play”). Perhaps video games have more in common with toys. Both are used for entertainment and can be used in an endless amount of ways. The functionality of toys are covered by patent law.¹⁵³ This is of course an oversimplification, as products with utility still have aspects that implicate copyright protected elements,¹⁵⁴ but the interaction involved in playing a video game does not fit within the same realms as other copyright subjects, such as movies and books. The main difference

146. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

147. *Gillette & Soper*, *supra* note 2.

148. *Id.*

149. *Copyright*, BLACK’S LAW DICTIONARY (10th ed. 2014).

150. *Williams Electronics, Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982).

151. *Fixed*, DICTIONARY.COM, <http://www.dictionary.com/browse/fixed> (last visited June 4, 2017).

152. JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 271 (2d ed. 2012).

153. *See Larami Corp. v. Amron*, No. CIV. A. 91-6145, 1993 WL 69581 (E.D. Pa. Mar. 11, 1993).

154. *See Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 992 (2d Cir. 1980).

between a song or a movie is that each interaction with a video game will produce different audiovisual elements.¹⁵⁵

Particularly in multiplayer games and sports games, there are endless possible decisions a user could make that would create a unique experience for the user.¹⁵⁶ In these games, one watching someone else play would not cause the viewer to feel that they have already experienced everything the game has to offer.¹⁵⁷ Video game developers create a virtual world through audiovisual elements, but also through artificial intelligence and the created world’s physics.¹⁵⁸ In this virtual world, people interact with other people. For example, in the video “Jet Swap (Only In Battlefield 3 Edition)” a player during a multiplayer session is flying a jet while an enemy jet controlled by a different person is trying to shoot the player down.¹⁵⁹ The player jumps out of the jet and fires a single shot from a rifle killing the enemy player, and then in midair, commandeers the rival’s jet.¹⁶⁰ It is unclear if the creators of the video game ever intended this to be a strategy. This interaction between these two people was a unique experience that has been viewed over 365,000 times.¹⁶¹

Another example are speed runs, in which a player tries to complete the game as fast as possible.¹⁶² While these playthroughs come from games with stories, the playthroughs show unique strategies regarding the game’s physics and glitches.¹⁶³ These are unique ideas and experiences that no one would know about without using gameplay footage.¹⁶⁴ A court finding “Let’s Play” videos to not have fair use protection would restrict this communication among the video game playing community, effectively cutting off the best ways to play their games.

The dynamic nature of the “Jet Swap” and speed runs are unlike the experiences had with other copyright protected works, because other copyrighted works are unchanging. The variation in video games gives a legitimate desire to show others their unique game experience, unlike the motivations behind pirating a song or movie.

155. Carlisle, *supra* note 63.

156. *Id.*

157. *Id.*

158. *This Is Frostbite*, FROSTBITE, <http://www.frostbite.com/about/this-is-frostbite/> (last visited June 4, 2017).

159. Stun_gravy, *Jet Swap (Only in Battlefield 3 Edition)*, YOUTUBE (Sept. 8, 2012), <https://www.youtube.com/watch?v=DzfErvendNA>.

160. *Id.*

161. *Id.*

162. See Letterswords, *Mass Effect Trilogy Speedrun in 7:02:48*, YOUTUBE (Nov. 12, 2016), <https://www.youtube.com/watch?v=KASJG5PxPy4>.

163. Taylor, Jr., *supra* note 1, at 265.

164. *Id.*

Beyond acknowledging that not giving fair use protection to playthroughs of games will restrict the sharing of unique experiences, finding that “Let’s Play” violates copyright law poses dangers to consumers. Video game advertisements rarely show what the game actually looks like. Instead, the ads use footage specially created for the commercial that is far more impressive than how the actual game looks.¹⁶⁵ When a big game is released, the most popular “Let’s Play” video makers try out the new game, and then many viewers use these videos to determine if the game is worth buying.¹⁶⁶ If consumers use “Let’s Play” videos to see what a game looks like because they cannot rely on misleading ads, it is even more concerning that Nintendo’s agreement gives Nintendo the right to disapprove of any video.¹⁶⁷ Nintendo could allow only videos with positive commentary to be uploaded.¹⁶⁸ If playthroughs with commentary are not protected under fair use, then video game companies can take away this forum for consumer information.

IV. SOLUTIONS

A. AN UNEASY PEACE

The first solution for protecting “Let’s Play” videos, and perhaps the most likely, is for this issue to never reach a court. The current state of “Let’s Play” benefits all parties. Users are generally free to make videos and make money, websites share in this revenue, and video game companies gain free publicity. As exemplified when Nintendo tried to restrict “Let’s Play,” there can be tremendous backlash to legal action.¹⁶⁹ A legal victory for video game makers may not be worth the loss in sales from angry consumers.

While Nintendo’s recent actions make litigation foreseeable, its competitors have been trying to help integrate the “Let’s Play” community through direct uploading to Twitch and providing broad licensing agreements.¹⁷⁰ Licensing seems to be a good solution because it would avoid a legal outcome that would hurt the loser, it would strengthen the tie between the video game industry and the “Let’s Play” community, and video game companies could earn some money from the use of their games by pocketing a percentage of the revenue in the licensing agreement.¹⁷¹

165. Dan Liebman, *Bad Ads: Misrepresentation in Video Game Advertising*, GAMEZONE (Mar. 6, 2010), http://www.gamezone.com/originals/bad_ads_misrepresentation_in_video_game_advertising.

166. Gillette & Soper, *supra* note 2.

167. Kohler, *supra* note 2.

168. *Id.*

169. Taylor, Jr., *supra* note 1, at 248–49.

170. Puddington, *supra* note 74, at 436.

171. Taylor, Jr., *supra* note 1, at 270.

B. A RULING THAT BREAKS FROM A TRADITIONAL FAIR USE TEST

As outlined in Part II of this Note, under a fair use test playthroughs with commentary would not be protected pursuant to an analysis grounded in current case law. If a court were to acknowledge that interacting with video games is a significantly different experience than reading a book or listening to a song, the court could make unique rules to protect “Let’s Play.” For the first factor, a court could adopt *Cariou*’s favorable interpretation that any new message is transformative.¹⁷²

A unique outcome for “Let’s Play” would be a fundamental break from copyright law. For a secondary work to copy an entire original work and to cut into a clear derivative market would be a drastic deviation from precedent, no matter how favorably the court looks at the first factor. The second factor is unfavorable for protecting fair use, as video games are fictional works, but that is not the end of the analysis. For the third factor, a court could either adopt the idea that watching the game is not a large part of the game because the viewer is unable to make decisions that alter the audiovisual elements presented,¹⁷³ or that the entire game is an appropriate amount to copy for the player’s commentary to be effectively communicated. This analysis of the third factor would not have a foundation in precedent; even *Cariou* did not protect minimally distorted photos in which a viewer would still be able to identify the original work.¹⁷⁴ “Let’s Play” playthroughs do not distort the original work enough to make it unidentifiable, therefore *Cariou* would not offer support for the third factor. Under the fourth factor, a court could give weight to the fact that there is no evidence that “Let’s Play” harms game sales against the derivative work right, but this would be a huge break from *Castle Rock*. A court could adopt these arguments outlined previously in Part II of this Note’s fair use analysis,¹⁷⁵ but to do so would be a large deviation from precedent. Such a ruling could be harmful for authors’ derivative work rights in other contexts.

Video games are too interactive to fit squarely under a traditional understanding of copyright law, but it would take tremendous lawmaking by a court to take an audiovisual work outside of these traditional copyright rules. The strongest arguments for “Let’s Play” to remain legal are policy arguments that would be extremely difficult for a court to adopt without supporting precedent.

172. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

173. Bartholomew, *supra* note 43, at 81.

174. *Cariou*, 714 F.3d at 711.

175. See *supra* Part II.

C. COMPULSORY LICENSE

This Note proposes that a compulsory license is the most suitable solution to balance the property rights of video game makers while protecting the expression of the “Let’s Play” community. “A compulsory license forces the copyright holder to grant the use of its work to nearly anyone in return for a set payment amount determined by the government.”¹⁷⁶ Currently, radio broadcasts of non-dramatic songs have a statutory compulsive license.¹⁷⁷ The radio broadcaster cannot change the melody, and if the broadcaster were to change the arrangement of the song, the broadcaster would not receive protection as a derivative work.¹⁷⁸ Any person can obtain a license if they give notice,¹⁷⁹ and if there is no notice, then distribution is considered a copyright violation.¹⁸⁰ The copyright owners and licensees are free to negotiate.¹⁸¹ These negotiations can be challenged and determined by the Librarian of Congress and Copyright Royalty Judges.¹⁸² For example, the default royalty fee for the public performance of sound recordings is \$0.0022 per performance for subscription services and \$0.0017 for non-subscription services.¹⁸³

This Note argues that the most concerning part of “Let’s Play” not having protection is that video game companies could take down any negative commentary about their games.¹⁸⁴ There is also substantial money being made from these original works. Perhaps a company like Nintendo, who has been losing money the last three years, should be able to share some of that money.¹⁸⁵ It would be understandably frustrating for Nintendo to see a “Let’s Play” maker like PewDiePie make millions of dollars annually,¹⁸⁶ while Nintendo continues to struggle financially.¹⁸⁷ What should not be permitted is the restriction of negative commentary, particularly in an industry in which viewers of “Let’s Play” watch playthroughs to determine if they want to buy the game.¹⁸⁸

The ideal solution would protect “Let’s Play” makers from the influence of video game developers. A compulsory license would be one

176. Copyright Act, 17 U.S.C. § 115 (2012).

177. *Id.* § 115(a)(1).

178. *Id.* § 115(a)(2).

179. *Id.* § 115(b)(1).

180. *Id.* § 115(b)(2).

181. *Id.* § 115(c)(3)(B).

182. *Id.* § 115(c)(3)(E)(i).

183. COPYRIGHT ROYALTY BD., WEB-IV DETERMINATION, SUBCHAPTER E—RATES AND TERMS FOR STATUTORY LICENSES § 380.10 (Dec. 24, 2015), <https://www.loc.gov/crb/web-iv/amended-web-iv-terms.pdf>.

184. Kohler, *supra* note 2.

185. *Id.*

186. *Id.*

187. *Id.*

188. Gillette & Soper, *supra* note 2.

way to ensure this. The statutory license would be similar to the one used for music, but with three differences. First, the compulsory license should be the only terms available—the parties should not be able to negotiate for better rates. There has already been Federal Trade Commission interest in “Let’s Play” video uploaders giving favorable reviews due to incentives from video game companies.¹⁸⁹ Without the possibility of a company giving a “Let’s Play” maker better rates, there is less risk of the industry coaxing favorable reviews. Second, instead of video game companies receiving payment per use, as is done in the music industry, video game companies should receive a percentage of ad revenue. With a percentage, low viewer “Let’s Play” uploaders would not have to pay more than their advertising revenue if they have any. The royalty rate would not need to be constantly adjusted for inflation and changes in the popularity of “Let’s Play.” Third, the compulsory license would not disapprove of changes to the original audiovisual elements, but in fact encourage them by giving “Let’s Play” makers copyright protection over their own original commentary. This solution would protect non-critical commentary as well as player experiences even without commentary. Reviews would pass the fair use test and would not need such a license.

A statutory solution seems far-fetched, as “Let’s Play” is not currently a salient enough issue for Congress to pass legislation on it. However, it is important to note that the two main websites that feature the most “Let’s Play” videos are owned by Google and Amazon.¹⁹⁰ Google spent \$16,830,000 in 2014,¹⁹¹ and Amazon spent \$9,435,000 in 2015 on lobbying.¹⁹² These two Internet giants have the clout and interest in preserving the integrity of the “Let’s Play” community to push for a statutory solution.

CONCLUSION

This Note proposes that a compulsory license would be the best solution to protect “Let’s Play.” Many videos would fail the fair use test and this would be an unfair resolution because copyright law is unable to integrate legal principles with interactive digital media that is used rather than solely observed. While videos do have some level of transformation, many “Let’s Play” videos still contain the entire original work with very

189. Christian Nutt, *The Federal Trade Commission’s Guidelines for YouTubers Are Strict*, GAMASUTRA (June 4, 2015), http://www.gamasutra.com/view/news/245237/The_Federal_Trade_Commissions_guidelines_for_YouTubers_are_strict.php.

190. Gillette & Soper, *supra* note 2.

191. *Google Inc.*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/clientsum.php?id=D000022008> (last visited June 4, 2017).

192. *Amazon.com*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/clientsum.php?id=D000023883&year=2015> (last visited June 4, 2017).

little distortion. “Let’s Play” videos are a derivative work market for video game companies and thus, video game companies would most likely prevail if litigation is ever pursued.

To declare that the large “Let’s Play” community is violating copyright laws and that video game companies have the ability to take down negative commentary necessitates another solution. The industry can continue its uneasy peace with “Let’s Play” makers and strengthen its ties with friendly policies and licenses. If a lawsuit was brought, a court could decide to deviate from prior case law.

The solution that would ensure that “Let’s Play” makers are free to voice their opinions, while still recognizing the property rights of the video game makers, is a compulsory license similar but not identical to those for broadcasted music. Video game makers would still retain their property rights because they would receive a percentage of the revenue and could take action against uploaders that have not given them notice. This solution recognizes that playthroughs are a derivative market because they are something that video game companies would issue licenses for. This solution also removes the potential of video game companies offering “Let’s Play” uploaders incentives for favorable reviews, protecting the community and consumers from slanted commentary. In conclusion, a compulsory license is the best way to manage the interests of video game companies, the “Let’s Play” community, and consumers.